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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1426

STATE OF ALABAMA,

Petitioner

VERSUS

THOMAS R. PRINCE,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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The Respondent's opposition brief indicates little disagreement between the parties on the facts. The conflict between the petition and the Respondent's brief is primarily one of emphasis. The Petitioner-State emphasizes the facts that the Respondent himself occasioned the delay by fleeing the State and continued it by refusing to waive extradition to Alabama for trial, that Alabama had made diligent efforts to determine the Respondent's availability for extradition and trial and that Alabama had extradicted the Respondent as soon as California indicated that he was available. The Respondent on the other hand emphasizes his efforts to have the charges dismissed and that the delay was for over eight years. In this brief the

State of Alabama will address the length of the delay and the question of the prejudice which allegedly resulted therefrom.

A

THE LENGTH OF THE DELAY

The Respondent argues that the delay of over eight years denied him a speedy trial. Such heavy emphasis is placed on the length of the delay that the Respondent seems to be saying that the other aspects of the case are of little if any relevance. The Respondent refers to his assertions of his right to a speedy trial and to the prejudice which allegedly resulted from the delay. However, the assertion of a right can hardly be considered effective if it is simultaneously coupled with obstruction of the right. As Judge Tyson noted in the Respondent's State Court appeal: "Clearly, the appellant [the Respondent here] could not both demand trial in Alabama on the one hand, and refuse to appear on the other." *Prince v. State* [Note 4] 50 Ala. App. 368, 371, Appendix "D" to the petition, p. 87. Similarly, the alleged prejudice resulting from the delay was, as will be discussed below, speculative at best. The Respondent places heavy reliance on the length of the delay apparently because there is little else in his favor.

At the outset, it must be candidly noted that if a state solely through malice or negligence failed for eight years to try an indictee, who was ready, willing and able to be tried, there could be little doubt that a denial of speedy trial would result. However, this case does not present a delay resulting from malice or negligence on the part of the State of Alabama, and the Respondent was neither ready nor willing nor able to be tried until the time he was in fact tried.

The length of the delay in this case, on which the Res-

pondent places so much reliance, was nearly identical to the length of the delay in *Smith v. Hooey*, (393 U.S. 374, 21 L. Ed. 2d 607, 89 S. Ct. 575 [1969])[1] This Honorable Court ruled that Smith had the right to a speedy trial but did not suggest that the right had been denied at that point. In 1972 this Honorable Court examined a delay of over five (5) years in *Barker v. Wingo* (407 U. S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 [1972]) and found no denial of speedy trial.

However, in *Barker v. Wingo* this Honorable Court did considerably more than recognize that the right to a speedy trial could, under some circumstances, tolerate considerable delay. In *Barker* this Honorable Court endeavored to establish the dimensions of the right to a speedy trial. Before attempting to set standards for what constitutes a denial of a speedy trial, this Honorable Court noted several differences between the right to a speedy trial and other Constitutional Rights: First, it was noted that unlike most Constitutional Rights, the society has a direct interest in speedy trial. Second, it was observed that delays of trial often work to the advantage of the accused and to the disadvantage of the prosecution; and third, that the right to a speedy trial cannot be rigidly defined.

This Honorable Court held in *Barker* that the test of the denial of the right to a speedy trial was a flexible balancing test based on all relevant factors, generally summarized as follows: The length of the delay, the reasons for the delay, the accused's actions asserting his right, and the prejudice to the accused. The delay in this case was certainly long enough to raise a possibility of a denial of speedy trial. But, *Barker*

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[1] Smith was indicted some time in May, 1960; this Honorable Court's decision was rendered January 20, 1969.

holds that delay alone is not enough. The reason for the delay in his case was that the Respondent was lawfully imprisoned in another State a continent away from Alabama and was unavailable for extradition. The Respondent claims that he, by various motions asserted his right to a speedy trial, but at the same time he was refusing to do the one thing which would have gotten him a trial—a waiver of extradition to Alabama for trial. This leaves the question of prejudice discussed in the next section.

B

THE ALLEGED PREJUDICE

In dealing with the question prejudice the Respondent claims four different instances of prejudice allegedly occasioned by the delay. Of these, two relate to the trial and two relate to the effects of the Alabama detainer on the Respondent's California imprisonment.

The Respondent claims that the delay denied him of three necessary witnesses. One of these was the late Dr. Martin Luther King. It has never been clear how these witnesses relate to the case nor is there any indication of what evidence they might have had. The only thing sure about them is that they were all dead by the time the Respondent agreed to return to Alabama to answer the charges.

The Respondent claims that the delay caused memories to fade. And, indeed several of the State's witnesses evidenced a lack of certainty and this undoubtedly weakened the State's case. However, it is difficult to see how the Respondent can claim prejudice as a result of the damage done to the State's

case by the delay which he caused.[2]

Finally, it is difficult to see how the State of Alabama can be charged with any difficulties suffered by the Respondent while he was incarcerated in California and was resisting extradition to Alabama.

The Respondent suggests that with such a long delay, prejudice should be presumed as a matter of law. This appears to fly in the face of *Barker v. Wingo* (407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 [1972]) which is later than any of the cases cited by the Respondent. It also flies in the face of common sense in a case such as this one, wherein the accused caused and continued the delay.

C

THE RESPONDENT DID NOT WANT A SPEEDY TRIAL

Mr. Justice Powell concludes the unanimous opinion of this Honorable Court in *Barker v. Wingo* (407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 [1972]) with these words which are extremely relevant in this case:

> ". . . [B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indi-

[2] In **Barker v. Wingo**, Mr. Justice Powell observed:

". . . A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. . . ." 407 U.S. 514, 521, 33 L. Ed. 2d 101, 111.

cates, as does this one, that the defendant did not want a speedy trial. . . ." 407 U.S. 514, 536, 33 L. Ed. 2d 101, 120.

Such is the record in this case. The record shows the Respondent doing all manner of things to avoid trial and to obtain dismissal of the charges: fleeing the jurisdiction, writing letters, filing motions, writs, etc., refusing to waive extradition. He demanded a speedy trial only after 1967. The reason for this is suggested by his November 22, 1967, letter to his attorney wherein he writes, "Therefore, I believe Alabama has lost jurisdiction to try or convict me." Appendix "F," II, to the Petition, p. 111. In other words, the Respondent sought a speedy trial only after he thought that it was too late to give him one and that the charges were due to be dismissed. Even then he refused to waive extradition until 1970.

The basic policy question presented by this case is whether the right to a speedy trial, a means of obtaining justice for the accused and society, may be perverted into a means of defeating justice.

CONCLUSION

In conclusion the Petitioner, the State of Alabama, points out that the opposition brief does not deny that the decision of which the Petitioner seeks review conflicts with the prior decisions of this Honorable Court and presents important questions which have not been but ought to be ruled on by this Honorable Court, as claimed in the petition. And, the State of Alabama again prays that the writ be issued.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, one of the attorneys for the Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this ____ day of July, 1975, I did serve the requisite number of copies of the foregoing Reply Memorandum on the Attorney for the Respondent by mailing said copies to him, postage prepaid, and addressed as follows:

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